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| Commerce Clause Limitations on State Regulation The issue: What limitations does the Commerce Clause place on the ability of states to enforce economic regulations? |
| **Introduction****The Commerce Clause is a grant of power to Congress, not an express limitation on the power of the states to regulate the economy.  At least four possible interpretations of the Commerce Clause have been proposed.  First, it has been suggested that the Clause gives Congress the exclusive power to regulate commerce.  Under this interpretation, states are divested of all power to regulate interstate commerce.  Second, it has been suggested that the Clause gives Congress and the states concurrent power to regulate commerce.  Under this view, state regulation of commerce is invalid only when it is preempted by federal law.  Third, it has been suggested that the Clause assumes that Congress and the states each have their own mutually exclusive zones of regulatory power.  Under this interpretation, it becomes the job of the courts to determine whether one sovereign has invaded the exclusive regulatory zone of the other.  Finally, it has been suggested that the Clause by its own force divests states of the power to regulate commerce *in certain ways*, but the states and Congress retain concurrent power to regulate commerce in many other ways.  This fourth interpretation, a complicated hybrid of two others, turns out to be the approach taken by the Court in its decisions interpreting the Commerce Clause.** **Justice Curtis, in *Cooley v Board of Wardens* (1851) outlines the case for recognizing, as a constitutional matter, zones of exclusive federal authority over commerce and other zones of concurrent state and federal authority.  *Cooley*, upholding a Pennsylvania law requiring that vessels entering Philadelphia harbor use of local pilots, applies a balancing test to judge the validity of the regulation.** ***Baldwin v G. A. F. Seelig* (1935) invalidated a New York law prohibiting the sale in the state of New York of milk bought outside of New York.  New York argued the law was necessary to avoid price competition that would drive dairies into producing less wholesome milk.  The Court, more realistically, saw the law as protectionist.  Justice Cardozo wrote that when "a state tries to isolate itself economically" it must show an important interest for doing so and that it had no less discriminatory mean open for accomplishing its goal.  Cardozo's test has become the standard test for evaluating state laws that discriminate against out-of-state commerce.** **In another New York milk case, *H. P. Hood and Sons v Dumond* (1949), the Court applied the *Baldwin* test for protectionist laws to the state's denial of a license to operate a depot to collect milk for distribution to Boston.  The Court saw the license denial as an effort by New York to horde a resource and thereby keep prices for its consumers low.*****Dean Milk Co. v Madison* (1951) deals with discrimination against out-of-state (as well as much in-state) commerce not by a state, but by a city.  At issue in yet another milk case was a Madison, Wisconsin ordinance that prohibited the sale of milk in Madison that was bottled more than five miles from the city's center.  The ordinance was justified by Madison as necessary to facilitate inspection by city dairy inspectors.  Finding the ordinance discriminatory and believing that reasonable non-discriminatory alternatives existed, the Supreme Court invalidated the ordinance despite the fact that a Milwaukee dairy was shut out of town just as much as one from Illinois.** ***Edwards v California* (1941) considered a challenge to a California law aimed at reducing the influx of dustbowl indigents to the state.  The California statute made it a crime to bring into the state any indigent non-resident.  Finding people in this case to be "articles of commerce," the majority found the statute to be a form of unconstitutional discrimination against out-of-state commerce.  (Four concurring justices would have preferred to invalidate the law on 14th Amendment privileges and immunities grounds.)** **In *Philadelphia v New Jersey* (1976), the Court struck down a New Jersey law that prohibited the importation of garbage into the state.  Concluding that garbage was "commerce," the Court viewed the law--despite its environmental justification--as unconstitutional discrimination agains out-of-state commerce.  The Court held that as long as reasonable, non-discriminatory alternatives exist that serve the states legitimate interests, they must be used instead of a discriminatory ban.** **In *Hughes v Oklahoma* (1979), the Court invalidated an Oklahoma law prohibiting the interstate transportation of minnows taken from Oklahoma waters.  The Court rejected Oklahoma's law that states "own" wildlife and therefore wildlife is not "an article of commerce."  The law could be upheld only if the state could show it served a significant local interest that could not be furthered by a non-discriminatory law--this Oklahoma could not show.** ***Maine v Taylor* (1986) is a rare example of a Supeme Court decision upholding a state statute that discriminated against out-of-state commerce.  The Court accepted the trial court's findings that no non-discriminatory alternatives to Maine's ban on the importation of live baitfish adequately served the state's interest in preventing the introduction into Maine waters of new parasites and non-native fish species that might upset Maine's ecosystems.**http://law2.umkc.edu/faculty/projects/ftrials/conlaw/washapple.gif**In *Hunt v Washington State Apple Ass'n* (1977), the Court determined that a North Carolina law that allowed only one grade (the U. S. Dep't of Agriculture's grade) to be placed on containers of apples sold in the state.  Washington's State Apple Ass'n contended that the law discriminated against Washington apples which are shipped in containers that include its own tougher state grades.  Concluding that a discriminatory effect (not a discriminatory intent) is all that is necessary to trigger the Baldwin test of a significant state interest and no non-discriminatory alternatives available, the Court invalidated North Carolina's apple-grading law.****http://law2.umkc.edu/faculty/projects/ftrials/conlaw/swedenburg.jpg****In the consolidated cases of *Granholm v Heald* and *Swedenburg v Kelly,* involving challenges to Michigan and New York laws respectively, the Supreme Court considered whether the 21st Amendment gave states the power to discriminate against out-of-state liquor distributers in ways that would otherwise clearly violate the Commerce Clause.  In its 2005 decision, the Supreme Court, on a 5-4 vote, found that state laws that prohibited out-of-state wineries from selling wine over the Internet directly to consumers violated the Commerce Clause.  The four dissenters interpreted** [**Section 2 of the 21st Amendment**](http://law2.umkc.edu/faculty/projects/ftrials/conlaw/Twentyfirstam.html) **as giving broad authority to states to ban such sales. [LINK to** [**Swedenburg Estate Vineyard**](http://www.swedenburgwines.com/place/our_place.html) **website]*****So. Pacific Co. v Arizona* (1945) demonstrates that state laws might violate the Commerce Clause even when in-state and out-of-state commerce are treated equally.  The case involved a challenge to Arizona's law prohibiting trains from crossing the state that contained more than 70 freight cars.  Southern Pacific complained that the law required them to choose between disassembling at the Arizona border larger trains, making two runs across the state, and then reassembling the trains or avoiding Arizona altogether.  Arizona argued the law was a safety measure designed to minimize the risk of "slack action" accidents to which longer trains are susceptible.  The Court applied a test that balanced the state's safety interest against what it saw as the very substantial burden the law imposed on interstate commerce.  The law was struck down.  The same test was used in 1959 to strike down an Illinois law requiring trucks to have contoured rear fender mudguards rather than the straight mud guard flaps required by most other states (*Bibb v Navajo Freight*) and in 1978 to invalidate a Wisconsin law that limited truck length to 55 feet at a time when most long haul truck lines had gone to 65 foot trucks (*Raymond Motor Transportation v Rice*).****http://law2.umkc.edu/faculty/projects/ftrials/conlaw/oneidafacility.jpgOneida-Herkimer's solid waste management facility****In *United Haulers Assoc. v Oneida-Herkimer Solid Waste Management Authority* (2007), the Court, by a vote of 6 to 3, upheld a New York law that required trash haulers in a region to deliver their waste to a county-owned waste treatment facility.  Justice Roberts, writing for the Court, concluded that the law not discriminatory because it did not favor a *private* in-state trash facility, but rather a government-owned facility, and therein lies a constitutional difference.  The burden of the "flow control" law, in the form of more expensive trash service, falls on in-state residents and could not be seen as an attempt to shift costs to out-of-state businesses.  Because the law was deemed non-discriminatory, the Court applied its balancing test and found that the local benefits of the law (effective financing of waste disposal and increased recycling) outweighed the abstract harm on out-of-state businesses of removing waste processing services from the national marketplace.****Our last two cases deal with the "market participant" exception to Commerce Clause analysis.  In *Reeves v Stake* (1980), the Court considered South Dakota's preference for selling cement from its state-owned Dacotah Cement plant to South Dakota customers.  Concluding that South Dakota was acting as a market participant rather than as a regulator of commerce, the Court upheld the state's preference for in-state customers.  *Reeves* was distinguished in S*outh-Central Timber Development Inc v Wunnicke* (1984), which invalidated Alaska's policy of insisting that high-bidders on state-owned timber agree to process some of the timber they purchased at Alaskan sawmills.  The Court saw the bidding rules as an attempt to control commerce "down the stream," and that therefore the state was acting as a regulator, not as a mere market participant.** |

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| The Commerce ClauseThe Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. |

**Cases** **Early Casehttp://law2.umkc.edu/faculty/projects/ftrials/conlaw/philharbor.jpg**Harbor of Philadelphia in the 1840s[**Cooley v Bd. of Wardens (1851)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/cooley.html) **Discrimination Against Out-of-State Commerce: The Milk Cases**http://law2.umkc.edu/faculty/projects/ftrials/conlaw/milkbottle.jpg[**Baldwin v G. A. F. Seelig Inc. (1935)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/seelig.html) [**H.P. Hood & Sons v Du Mond (1949)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/hood.html) [**Dean Milk Co. v Madison (1951)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/deanmilk.html) **Discrimination Against Out-of-State Commerce: Other Cases**[**Edwards v California (1941)**](http://law2.umkc.edu/faculty/projects/ftrials/conlaw/edwardsvcalif.html) [**Philadelphia v  New Jersey (1978)**](http://law2.umkc.edu/faculty/projects/ftrials/conlaw/philadvnj.html)[**Hughes v Oklahoma (1979)**](http://law2.umkc.edu/faculty/projects/ftrials/conlaw/hughes.html)[**Maine v Taylor (1986)**](http://law2.umkc.edu/faculty/projects/ftrials/conlaw/maine.html)[**Hunt v Wasington State Apple Advertising Comm'n (1977)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/hunt.html)**Discrimination Against Out-of-State Commerce: Different Rules for Liquor?(Power of States Under 21st Amendment)**[**Granholm v Heald/ Swedenburg v Kelly (2005)**](http://law2.umkc.edu/faculty/projects/ftrials/conlaw/granholmheald.html)**Facially Neutral Laws: The Balancing Test** [**So. Pacific Co. v Arizona (1945)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/sopacific.html) [**Raymond Motor Transportation v Rice (1978)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/raymond.html)[**United Haulers Assoc. v Oneida-Herkimer Solid Waste Authority (2007)**](http://law2.umkc.edu/faculty/projects/ftrials/conlaw/unitedhaulers.html)**Market Participant Exception** [**Reeves v Stake (1980)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/reeves.html) [**South-Central Timber Development v Wunnicke (1984)**](http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/wunnicke.html) http://law2.umkc.edu/faculty/projects/ftrials/conlaw/cementplant2.jpg**The Dacotah Cement plant in Rapid City, owned by the state of South Dakota.  South Dakota's preference for in-state buyers of cement from this plant was challenged in *Reeves v State* (1980).**http://law2.umkc.edu/faculty/projects/ftrials/conlaw/sptrain1.jpg**Southern Pacific train.** http://law2.umkc.edu/faculty/projects/ftrials/conlaw/hphood1.jpg**H. P. Hood & Sons.  The company successfully challenged New York's denial of its license to distribute milk collected in New York to Boston.** **Questions**1. Which interpretation of the Commerce Clause outlined in the introduction makes the most sense?  Why? 2.  Was the Pennsylvania pilotage law involved in Cooley more likely enacted for safety reasons or for protectionist reasons? 3.  If, as the Court said in *Marbury*, it's the Supreme Court's job to say what the Constitution means, why should the Court defer to Congress when it comes to defining the reach of state power to regulate commerce? 4. Can you imagine a situation in which the Court might invalidate a state regulation of commerce when it had been specifically authorized by Congress? 5.  Baldwin makes clear that the Court will scrutinize carefully state laws that discriminate against out-of-state commerce?  But how to we determine whether a law does discriminate against out-of-state commerce?  Should we look only at intent, or is a discriminatory effect enough?  6. If a state like Minnesota or Wisconsin, with many small dairy farms, enacted a law that prohibited the sale within the state of "milk coming from cows with less than eighty square feet of stall space," would the law be constitutional?  The law might have been supported by some on animal welfare grounds, whereas other legislators might have seen benefits from reducing the inflow of milk from state such as California, where cows on "factory farms" are typically are afforded less space than on Minnesota and Wisconsin family dairy farms. 7.  Should *Edwards v California* have been decided on Commerce Clause grounds?  Is there anything to the argument that viewing the movement of migrants across state lines as commerce diminishes the importance of the right involved? 8.  Do you agree that something with a negative value such as garbage should be considered an article of commerce? 9.  Do you think New Jersey's ban on the importation of out-of-state garbage was motivated by environmental concerns?  If New Jersey's law were upheld, and other states enacted similar bans, would the environment be better off for it? 10.  If a garbage importation ban is unconstitutional, why is it okay to ban baitfish or diseased animals?  Would a state ban on radioactive waste be constitutional in the absence of Congressional action? 11.  If states were free to restrict the shipment out of state of important resources (wildlife, coal, oil, timber, corn), how often would they do it?  Is there a danger that a state with a near monopoly on a resource would try to corner the market or hoarde the resource for its own citizens? 12.  It's pretty clear that Madison's ban on milk (*Dean Milk Co*.)produced more than 5 miles from the center of the city was aimed just as much at other Wisconsin dairies as out-of-state dairies.  Should that affect the constitutional analysis? 13.  If and when an efficient means is developed for inspecting for parasite-carrying baitfish, does the Maine baitfish ban upheld by the Court suddenly become unconstitutional? 14.  In *Hunt*, if Washington state gave "A" grades to apples that merited a lesser grade from the USDA, would the case have come out the same way, or would the stronger interest in avoiding consumer confusion then overcome the discriminatory effect on interstate commerce? 15.  If a state set a speed limit of 50 miles per hour on all of its highways, would the law be constitutional?  If it is, what about a speed limit of 40 miles per hour?  When do the burdens on interstate commerce clearly outweigh the life-saving local benefits that come from a lower speed limit? 16.  In *Bibb v Navajo Freight*, the Court invalidated an Illinois requirement that trucks us contoured mudguards when surrounding states required straight mudguards.  What is only a slight majority of states favored one type of mudguard?  Does *Bibb* suggest that a law in one state might be unconstitutional at the same time an identical law in another state (say, a contoured mudguard requirement in Hawaii) might be constitutional? 17.  The Court says non-discriminatory state laws burdening interstate commerce will only be struck down when the burdens are "clearly excessive" in relation to the local benefits.  How clearly excessive?  What if the interstate commerce costs outweight the local benefits 3 to 2?  What about 2 to 1?  3 to 1? 18.  Does *Reeves* suggest that states are free to favor their own citizens with respect to a large-variety of state-owned resources, such as universities, parks, and beaches? 19.  Could a state say that it will only buy automobiles (for its highway patrol, etc.) from car companies operating plants in-state?   |